Honoring the First Amendment

Media Institute Luncheon
Remarks of Commissioner Kathleen Q. Abernathy
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As prepared for delivery.

Good afternoon and thank you so much for inviting me to speak with you today. I would like to commend the Media Institute on its work with the Cornerstone Project. The Institute's goal of supporting and defending the First Amendment is apparent in its efforts to educate the public and reach citizens nationwide. These are important lessons for our generation – especially at a time when the freedoms that we too easily take for granted are called upon to be defended.

We sometimes forget the difficult rite of passage that our First Amendment rights had to endure before arriving at today's balance of interests. Sometimes I find it useful to explore where we have been in charting where we should go.

In the early 1900s, under the auspices of its state police power, government regulated motion pictures in ways that might seem shocking today. States were concerned that the power of this new medium would affect impressionable audiences with stories of sex and violence. In particular, they were concerned that "Hollywood's sympathetic portrayal of gangsters and 'loose women' would corrupt the values of children and newly arrived immigrants." [i]

In 1915, the Supreme Court upheld the establishment of a board of motion picture censors by the state of Ohio. [ii] The board had the authority to approve only films that were "moral, educational, or amusing and harmless."[iii] The Supreme Court held that movies "may be used for evil" and "are more insidious in corruption by a pretense of worthy purpose."[iv] The Court found it sufficient that Ohio had "considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions." The Court added: "We would have to shut our eyes to the facts of the world to regard the precaution [as] unreasonable"[v]

At the federal level, content-based regulation also was common. In the late 1920s and early 1930s, the Federal Radio Commission declared that it would consider the content of a station's programming to determine whether that station was serving the public convenience, interest, or necessity. It would not renew a station's license if it found that the station was broadcasting programs that were "uninteresting" or "distasteful."[vi]

In addition, in 1940, stations were broadcasting editorials urging the election of various candidates for political office or supporting one side or another of various questions in public controversy. The Commission, however, found this to be impermissible, concluding that "[r]adio can be an instrument of democracy only when devoted to the

communications of information and exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee . . . It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." [vii]

Even more recently, we have seen censorship of books in educational institutions and public libraries. Such books include *The Catcher in the Rye*, *Ann Frank: Diary of a Young Girl*, *The Scarlet Letter* and *To Kill a Mockingbird*. Even as we may bristle at these historic examples of limitation on speech -- today the effort to ban books continues. The American Library Association reported 448 efforts to ban books in 2001 – and a prominent target of that effort were the four "Harry Potter" children's novels for "promoting belief in witches and wizards."[viii]

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I have always believed that we, as a society, and government, as an institution, need to learn from our history, lest we repeat it. These historic snapshots are but a few examples of what can happen when the government, even with the best of intentions, reaches out to curtail free speech in order to advance a subjective view of "good" or "worthy" speech.

Many people NOW recognize the importance of books like *The Catcher in the Rye* and *Ann Frank: The Diary of a Young Girl*.

We NOW recognize that movies can provide a valuable means of information, learning, and dialogue, as well as artistic expression. And some may – or may not – just entertain.

We NOW want broadcasters to contribute to the marketplace of ideas, rather than restricting them from being a participant at all. The Commission, through its licensing process, strives to achieve "the widest possible dissemination of information from diverse and antagonistic sources."[ix]

It is with hindsight that our prior overreaching efforts become clear. We should learn from the past and not impose on others our own personal beliefs as to what is right or moral or entertaining. That is why I tread with particular care when newly proposed regulations affect content and, therefore, affect the exercise of free speech rights. Thus, anytime the FCC considers regulations aimed at the media, the question we always need to ask is: "How does this proposal square with First Amendment interests?" And "Can our goals be achieved with any narrower regulatory approach that may reduce or ideally eliminate any negative impact on First Amendment rights"?

With this in mind, I would like to talk today about two areas of FCC regulation in particular – enforcing our indecency rules and defining a broadcaster's public interest obligations.

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With respect to indecency, Congress provided that "whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . ." Congress gave the FCC responsibility for enforcement of this provision. Consistent with this and subsequent statutes and case law, the Commission's rules restrict the broadcasting of indecent material to hours when children are less likely to be viewing television or listening to the radio – between 10:00 p.m. and 6:00 a.m. The FCC's indecency rules, like all our rules, must be strictly enforced. When I came into office, I enunciated five core principles, one of them was the need to vigorously enforce our rules. So, I will not shy away from our responsibility in this area.

Moreover, I have also emphasized that in evaluating my responsibilities, I will always look first to the FCC's obligations under the statute. It is not within my purview to question our statutory obligation to enforce the restrictions on indecency and obscenity given that it is statutorily based – and has been upheld by the courts. I am appointed, not elected. Our system of representative government is premised on the notion that Congress speaks for the public, and in our case, Congress has memorialized its views regarding the scope of U.S. communications policy in the Communications Act. The specific statutory mandates take on added importance in an agency that is independent and, by statute, bipartisan. Therefore, I believe that the FCC has a particular obligation to adhere as closely as possible to the statute in order to regulate in the public interest. As part of that obligation and with the help of the FCC's Enforcement Bureau, I will ensure that we comply with our statutory mandate to enforce Congress' restrictions on the airing of indecent and obscene material.

Can I, as a Commissioner, however, go beyond this mandate to censor material I personally find offensive or tasteless? Would I want to set a precedent for future Commissioners to impose their likes and dislikes on the public? The answer is clearly no. The Commission strays too far from its enforcement obligations when we start making judgments as to what is good television and what is bad television. Or, what is good radio and what is bad radio. Or, when we speak out against a program merely because it has received press attention. Indecency is measured by "contemporary community standards," not my, or my family's, or my staff's, personal taste or preference. Thus, it is not simply a measure of what I – or any individual – may not like to watch or hear, but, as the Commission has stated, what is "patently offensive under contemporary community standards for the broadcast medium." And I as a FCC Commissioner am not a "community" nor am I a proxy for such. I believe I must be very humble about who and what I purport to represent – and in this regard I will always be extremely reluctant to act on my personal views of what is offensive, lest someday some other Commissioner on some other Commission limit what I see based on their personal views.

What is offensive to some, moreover, may have artistic value to others. The examples of prior government censorship of movies and books that I discussed earlier make that evident. More recently, the Enforcement Bureau received complaints from the public about the airing of the edited version of "The Real Slim Shady." This song – whether I liked it or not – won the Grammy for Best Rap Solo Performance of 2001.

In addition, there is an important check on what we see on television and hear on the radio. There is a market-based way of addressing our concerns. As consumers, the media will serve our preferences. We can exercise that power by changing the channel, turning off the television or radio, or raising our voices in complaint. We need not sit by passively, but can actively make our own choices. That is particularly true today given the plethora of voices that are available. If a television show or radio personality is not garnering adequate ratings, it will lose advertising support. And nothing, especially in this economy, can survive on broadcast television or radio without advertising support. The ability to change the channel has a far more immediate impact on broadcasters than government regulation does.

In addition, if indecency were the only thing that captured viewers' interests, cable and DBS programmers, who are not subject to the indecency standards, would be using that material far more liberally than they currently do. While there are some shows that come to mind that do pass the boundaries of what is allowed on broadcast television, many other networks – like the Discovery Channel, the History Channel, Nickelodeon, ABC Family, MSNBC, and CNN, to name just a few – provide programming that is educational and entertaining – and not indecent.

Many justify restraints on free speech as necessary to protect our children from sexual and violent images and from material that some simply regard as "inappropriate." In some cases – as in limiting the hours when indecent material may be broadcast over the public airways – government restraints strike a compelling constitutional balance. With respect to other programming that some may find objectionable, I believe that a market-based approach that provides more choices to viewers and facilitates parental control over what our children are viewing is far better than restricting what all Americans can say, hear and see. If the concern is about what our children are exposed to, we should not solely look to government to control speech, but to look to government – if at all – to give us the means to control the speech that our families hear. For example, the V-chip, in conjunction with the ratings system instituted by the broadcasters, provides parents with a valuable tool to make educated decisions about the programming that is available to their children. The V-chip empowers parents with the ability to make choices, without censoring programming material at its origin. In fact, in my next issue of Focus on Consumer Concerns, my consumer newsletter which will be available on my website in March, I will attempt to draw additional attention to the availability of the V-chip, as well as other steps that parents can take to control the content that their children see, for just this reason: it empowers individuals in the marketplace to make informed decisions more easily.

Digital cable systems also are employing technology that will enable consumers to restrict access to certain channels – making such channels accessible only by entering a preset code. Thus, advances in technology may provide solutions that enable parents to make decisions about what is appropriate for their children, without the government restricting what adults may lawfully want to hear or see.

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In addition to the indecency issues I have described, similar issues arise when people try to define specifically what a broadcaster's public interest obligations should be. It has long been recognized that one of a broadcaster's fundamental public interest obligations is to air programming responsive to the needs and interests of its community of license. Broadcasters are afforded considerable flexibility in how they meet their public interest obligations, but some people have argued for more defined standards or requirements.

I would be troubled, however, if the FCC began to substitute its judgment for that of broadcasters and their communities and would be hesitant, as a Commissioner sitting inside the beltway, to determine how broadcasters in Takoma, Topeka, Baton Rouge and Biloxi could best serve their communities. If the FCC mandates – or even suggests – specific types or categories of information that are necessary to meet a broadcaster's public interest obligations, it would be placed in the unfortunate position of deciding what programming is worthy of being deemed in the public interest and what is not, and what programming is worthy of being aired and what is not. I fear that the agency would place pressure on broadcasters' editorial choices and unnecessarily and unwittingly suppress other speech. Even if the FCC proposes mere guidelines and not regulations, broadcasters, in order to avoid a contentious renewal process, would be likely to air what the FCC suggests over other programming that also may be of importance and value to their communities.

Remember that it was only about two years ago that we learned the White House was previewing network video tapes and deciding whether a given program was sufficiently anti-drug to warrant "credit" against a broadcaster's anti-drug public service announcement commitment. It's not that anyone opposes drug education, but I believe it is indeed a dangerous government intrusion to evaluate prior to broadcast the "rightness" of a message – even when its done with the best of intentions. Quantifying or narrowly defining the public interest obligation could put government in just such a role.

I would not be opposed, however, to greater disclosure that demonstrates a broadcaster's community interest programming. For example, in addition to the public file, posting information on a station's website regarding the type of public interest programming that is available on the station and when that programming is aired could foster more dialogue between the community and the station, without infringing on the First Amendment rights of broadcasters.

And, it is important to remember that even without additional standards, broadcasters have a solid record of serving the public interest. Some may do it better than others, but overall, a survey conducted by the NAB concluded that local radio and television stations contributed $8.1 billion in community service nationwide over a twelve-month period in 1998-99. This figure is based on the value of air time broadcasters contribute for public service announcements and funds stations raise for charitable causes and disaster relief organizations, and does not include other news, information and educational programming that stations provide to their local communities.

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I am a mother of a six-year old girl. There may be many things that are broadcast that I don't believe she should listen to or watch. I have found that I now restrict my own viewing habits because much of it is simply inappropriate for my child. There also may be programming that I would particularly like her to watch or hear. But, I want both my husband and myself to be the ones to decide what is appropriate for my family, not the government. I want local broadcasters to respond to what my interests are, not to what government tells them my interests should be.

Free speech is not about liking what other people say. Trust me – many lobbyists that come into my office may wish that to be otherwise because my views may not necessarily coincide with theirs. But, as Justice Jackson stated fifty years ago, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . "[x]

There will be many challenges that I face during my tenure at the FCC. And the question that I always will ask of any proposed media regulation is how it will affect our First Amendment rights. If we encroach on these fundamental rights, we weaken and threaten who we are as a nation.

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[i] Schiller, Reuel E., Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment, 86 V. La Rev. 1, 29-34 (2000)(hereinafter "Schiller").
[ii] *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).
[iii] 236 U.S. at 241.
[iv] 236 U.S. at 242.
[v] *Id.*
[vi] Schiller at 45-46 (citing Federal Radio Communication, Second Annual Report, 169 (1928).
[vii] Mayflower Broad. Corp., 8 FCC 333, 340 (1940).
[viii] *Celebrate the Freedom to Read,* South Florida Sun-Sentinel, February 1, 2002, at 26A.
[ix] *See* Associated Press v. U.S., 326 U.S. 1, 20 (1945).
[x] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).